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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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**FEDERAL POWER COMMISSION, PETITIONER**

**v.**

**CONWAY CORPORATION, ET AL., RESPONDENTS**

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**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

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## BRIEF FOR RESPONDENTS CONWAY CORPORATION, ET AL.

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MISSISSIPPI COUNTY ELECTRIC COOPERATIVE, INC., ARKANSAS

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## BRIEF FOR RESPONDENTS CONWAY CORPORATION, ET AL.

## STATUTE INVOLVED

Sections 19, 20, 201, 205, 206 and 209 of the Federal Power Act[1], 16 U.S.C. 812, 813, 824, 824d, 824e, and 824h are set forth in the Appendix to this brief, *infra*, pp. 45-52.

[1] Sometimes referred to as "the Act".

## QUESTION PRESENTED

Whether the court below correctly determined that the Federal Power Commission[2] erred in its determination that it lacked the power, in ruling on a proposed rate increase to wholesale customers, with which the filing utility competed directly at retail, to remedy the anticompetitive impact caused by the alleged intentional "price squeeze" or discrimination imposed when the utility raised its wholesale rates substantially above those which it charged at retail.

## STATEMENT OF THE CASE

### I. Before The F.P.C.

Respondents, the Conway Corporation (a corporation owning and operating the electric system of the City of Conway, Arkansas), Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, and the City of West Memphis, are all municipally owned electric systems in the State of Arkansas. Farmers Electric Cooperative Corporation and Mississippi County Electric Cooperative, Inc. are cooperative electric systems in Arkansas financed by the Rural Electrification Administration.[3] Each purchases all, or a major portion of, the electricity it sells to retail customers at wholesale from Arkansas Power & Light Company ("AP&L" or "the Company"), a subsidiary of Middle South Utilities, Inc., a public utility holding company under the Public Utility Holding Company Act of 1935. Each is bounded, in whole or in part, by territory served at retail directly by AP&L.

On June 1, 1973,[4] AP&L filed a wholesale rate increase against petitioners (and several others) with the FPC which, according to AP&L's own filing, would increase rates to the Cities by 22.6% and to the Cooperatives by 34.9% (exclusive of fuel clause revenues).[5]

The customers filed a timely Protest, Motion to Reject and Petition to Intervene on June 28, 1973, and corrected certain areas therein by a Motion for Leave to Substitute and Add on July 2.[6] As here relevant, customers noted that so far as could be determined, the sole purpose of the rate increase was to attempt to squeeze the customers, or some of them, out of competition, and to make them more susceptible to the persistent efforts of the Company to take over the publicly owned systems of the state (JA6). Arkansas is a state which was then (and is now) vigorously seeking new industry. The accompanying payroll and other benefits of new industry can, the customers stated, be vitally important to a community. Customers and AP&L have both actively sought to encourage new industrial load, and customers have generally sought to match AP&L tariffs for such loads, which they had successfully been able to do until this filing (JA6-7). Customers demonstrated that even on an incremental basis, they would not be able to match tariffs for such retail customers with AP&L without paying more, simply for purchased power, than they would receive from such retail customers, without any consideration of their own fixed and operating costs (JA7-10). Customers further noted that they had offered not to oppose AP&L's wholesale rate increase if AP&L would agree to increase its industrial retail rates to maintain the historic comparative retail-wholesale competitive situation but that AP&L had declined that offer (JA7).

Customers went into considerable detail as to the deficiencies of AP&L's proposed cost of service, and the degree to which AP&L appeared to be overreaching simply to give a

---

[2] Sometimes herein "the FPC" or "the Commission".

[3] Respondents will be sometimes referred to, for convenience, as "the customers".

[4] While not directly relevant, it may be noted that the court below used a date of filing of May 31, 1973. 510 F.2d at 1266, Petition Appendix 2. That was the date used by customers in their pleadings below, and was the date stated in the Commission's Notice of Proposed Changes in Rates and Charges issued in the underlying docket (E-8250) on June 15, 1973. as will be apparent, the real issues are numerous enough, so we acquiesce in the June 1 date utilized by the Commission herein for consistency.

[5] The exact percentage increase depends, of course, upon the base utilized.

[6] The corrected Protest, etc., is reproduced in the Joint appendix at JA 4-25.

rationale for raising its competitors' rates (JA10 *et. seq.*).

Since the wholesale and retail large industrial tariffs had historically had the same demand and energy blocks except for a $2,000 lower cost to the wholesale customers in the first monthly demand block, the customers asserted that the filing by AP&L to raise its wholesale rates to its competitors, while refusing to raise its large industrial rates, required explanation (JA18), and concluded, as here relevant:

> ". . . since the company has filed a plainly discriminatory rate against the single class of customer which it has historically attempted to drive out of business, without justification on any ordinary cost of service basis, the filing should be rejected out of hand, with leave for the company to file again a) if and when it files to increase its retail industrial rates, and b) if and when it can justify an increase to the wholesale customers on a single year recent 'test year'.

In a response filed July 20, 1973, AP&L objected, as here relevant, to the calculations made by the customers on the price squeeze issue, and suggested that it would prove at the hearing that there was no price squeeze (JA26-27). Thus, it objected to the motion by the customers to reject, and stated (JA26) "the issues raised merely indicate the appropriateness of a hearing so that all parties will have an opportunity to support their positions."

On July 31, 1973, the Commission issued an Order (JA34) accepting and suspending the proposed tariff sheets. In pertinent part, that Order provided (JA35):

> "Notice of filing was issued on June 15, 1973, with protests and petitions to intervene due on or before June 28, 1973. A Protest, Motion to Reject, and Petitions to Intervene of Publicly Owned Wholesale Customers [footnote omitted] (Customers) was timely filed June 28, 1973. In support of its motion to reject, Customers first allege that APLC's [sic] participates in anticompetitive activity and that the proposed rate increase would 'squeeze' Customers out of competition with respect to sales to industrial customers.
>
> By order issued May 31, 1973, in *Indiana and Michigan Electric Company* Docket No. E-7740 we set minimum standards for those who would raise anticompetitive issues. These standards



> are that the petition to intervene must clearly specify 1) the facts relied upon, 2) the anticompetitive practices challenged, and 3) the requested relief which is within this Commission's authority to direct. Our review of Customers' petition to reject or intervene indicates that it fails to specify the relief which is within this Commission's authority to direct. Accordingly, we shall limit Customers' participation in this proceeding to matters other than the alleged anticompetitive activities. The action is without prejudice to Customer's right to file an appropriate amended petition which sets forth relief for the alleged anti-competitive conduct that is within this Commission's authority to direct."

In response to that Order, and the suggestion therein that the customers file an appropriate amended petition, on August 22, 1973, customers filed their Amended Petition (JA43 *et. seq.*). That Amended Petition called the Commission's attention to the representations made by it to this Court in *Gulf States Utilities Company v. FPC* (JA44) with respect to anticompetitive allegations made under Sections 205 and 206 of the Federal Power Act; incorporated by reference the earlier Protest, Motion to Reject, and Petition to Intervene . . ., and stated:

> "As Petitions have demonstrated, this rate increase filing appears to be an attempt to institute a 'price squeeze' to the end of putting Petitioners out of business as independent members of the electric power industry. In addition, as we have shown, the rate at which AP&L proposes to charge Petitioners is unduly discriminatory vis-a-vis the Company's retail industrial rates, which have historically been on a basis similarly structured, but somewhat higher than the wholesale for resale rates of AP&L"

After quoting from the opinion of this Court in *Gulf States Utilities Company v. FPC*, 411 U.S. 747 (1973), the customers noted (JA44-45) that:

> ". . . whatever else the language may mean, there can be no question that it directs this Commission to eliminate rate structures which are anticompetitive by reason of a price squeeze.
>
> "In these circumstances, and without waiving any other relief heretofore sought, Petitioners request this Commission to reduce the proposed rates filed by AP&L to eliminate the

anticompetitive price squeeze, within its authority under Sections 205 and 206."

On October 29, 1973, the Commission issued an Order Denying Amended Petition to Intervene and Clarifying Prior Order (JA82 *et. seq.*). In that Order, the Commission made clear that it would refuse to consider the "price squeeze" or discrimination issue (JA53-54):

> "The Relief sought by Petitioners is beyond the authority granted to us under the Federal Power Act. Under the Federal Power Act this Commission is charged with the responsibility for reviewing rate applications to insure that the rates proposed are just and reasonable . . .
>
> Wholesale rates must recover allocated wholesale costs. Customers' suggested relief is a rate related not to wholesale costs but rather related to APLC's industrial rates. However, APLC's industrial-rate level and the accounting and the rate making principles underlying that rate level is under the sole jurisdiction of the state commission and not the Federal Power Commission. We have no jurisdiction over APLC's industrial rates, and we do not choose to open this hearing to an examination of those rates. Such an action would require a detailed analysis of APLC's retail cost of service and would result in this Commission interjecting itself into an area in which it has no jurisdiction.
>
> Petitioner's allegation of 'price squeeze' in and of itself, does not constitute anticompetitive behavior by APLC given the fact that any wholesale rates we approve must be based on allocated wholesale costs. To approve rates which recover less than those costs would produce grave consequences, since such action would be tantamount to imposing confiscatory rates on APLC and possible subsidization of APLC's wholesale service by APLC's industrial customers or other retail customers of APLC over whom we have no jurisdiction. Moreover, Petitioners' proposal would subordinate our authority to set wholesale rates to the retail ratemaking jurisdiction of the state commission.
>
> Customers' Amended Petition cites language in *Gulf States Utilities Co. v. FPC, et al.*, [Footnote omitted] which it asserts directs the Commission to eliminate rate structures which are anticompetitive by reason of a price squeeze. However, as we stated in our order in *Southern California Edison Company*, Docket No. E-8176, issued on September 21, 1973, the *Gulf States* opinion clearly states that its ruling is not to be



> interpreted as saying that the Commission must always hold a hearing on the antitrust issue [Footnote omitted]. The Supreme Court also noted without objection that the Court of Appeals had observed that the summary disposition of the antitrust argument in a proceeding might be acceptable providing such disposition does not go unexplained."

On November 5, 1973, customers petitioned for rehearing of the Order of October 29 (JA56, *et seq.*).[7] That petition for rehearing noted that (JA56):

> ". . . this Commission appears to have determined that it will refuse to consider an intentional, voluntary, and conscious effort of a wholesale supplier of electric energy to 1) charge wholesale customers whose rates are set by this Commission substantially more than is charged retail customers with similar characteristics whose rates the Company has voluntarily refused even to seek to increase, in violation of the anti-discrimination provisions of Sections 205(b) and 206(a) of the Federal Power Act, and 2) alter its historic wholesale-retail price structure in such a way as to preclude its wholesale customers from competing for new retail industrial load of the sort which is and historically has been vigorously sought by both the company and petitioners [Footnote omitted] in violation of the Sherman and Clayton Acts."

The customers went on to discuss at considerable length the legal errors in the Commission's holding.

On December 5, 1973, the Commission issued its Order Denying Petition for Rehearing on this matter (JA65-67). In that Order, the Commission repeated the rationale of its October 29 Order, and denied the Petition for Rehearing filed by the customers.

On December 6, 1973, the customers filed their petition for review in the court below.

### 2. The Court Below

On April 4, 1975, the court below entered its opinion and judgment. *Conway Corporation v. FPC*, 510 F.2d 1264 (CADC).[8] As here relevant, the court below discussed the competitive

[7] A petition for rehearing is a jurisdictional requisite for appellate review under Section 313(b) of the Federal Power Act, 16 USC 825*l*(b).

[8] Judges Tamm, Leventhal and MacKinnon.

framework within which the questions raised occurred (at 1268-1269). On the merits, the court examined the teachings of this Court in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973), and the statutory language together with the legislative history of Part II of the Federal Power Act, and unanimously concluded that the Federal Power Commission had ample authority to deal with the discrimination or price squeeze alleged, by action addressed to the wholesale rate subject to the jurisdiction of the Federal Power Commission, without in any way impeding or impinging upon regulation of retail rates by the state commission having jurisdiction of such rates.

### 3. The Grant of Certiorari

On June 27, 1975, in response to an application for extension of time for filing a petition for a writ of certiorari, the Chief Justice extended the time for filing such a petition to August 2, 1975. On August 1, 1975, in response to an application for a further extension of time within which to file a petition for a writ of certiorari, which requested "that the time within which to file a petition for a writ of certiorari be extended to September 1, 1975.", an order was entered extending the time for filing "to and including September 1, 1975". The Federal Power Commission's petition for a writ of certiorari was docketed in this Court on September 2, 1975.[9] The Petition for a writ of certiorari was granted on November 11, 1975.

## SUMMARY OF ARGUMENT

The position urged upon this Court by the Commission is inconsistent with the wording of the Federal Power Act, with the thrust of utility regulation and common law, with the past

[9] It should be noted that customers had opposed one of the several motions by the FPC in the court below for a stay of its mandate on the basis that allowing the mandate to go down would at least allow the customers to engage in the discovery relevant to this issue (denied by the Administrative Law Judge) and adduce testimony for a record for the Commission's decision. Nearly three years after filing of the underlying rate increase, hearings have not yet been completed.



precedents of the Commission, with the teachings of this Court, and with basic notions of accommodation and comity between state and federal interests. Moreover, that position would require constant and otherwise unnecessary law suits, and would interpose federal courts directly into matters long considered subject to the primary jurisdiction of state and federal regulatory agencies. As we demonstrate, there is no reason or basis for a result so devoid of common sense or workability.

The Commission argues to this Court that it has no authority to consider and rectify a discriminatory wholesale rate imposed upon a wholesale customer by its competitor at retail because Congress somehow withheld from it power so to do; that the Commission is directed to fix "just and reasonable" wholesale rates without consideration of discrimination vis-a-vis non-jurisdictional rates[10]; and that an (unspecified) remedy remains for customers in the federal courts. The Commission's argument here, however, though substantially better reasoned than its orders here on review, fails to come to grips with much of the history of public utility regulation in this country. As we shall demonstrate, the competitive situation in which customers here find themselves is one which vitally affects the electric power industry and particularly the wholesale customers the FPC was established to protect. The historic authority to remedy discriminatory treatment of customers of public utilities was one of the major, if not the major, basis for regulation at common law and by state commission, and the same considerations underlying that authority underlie the decisions of the courts under the antitrust law. That authority did not evaporate when the Public Utility Act of 1935 was passed, but was transferred to the Commission. The court remedy proposed by the Commission may be an alternative, but it is not a logical replacement remedy nor, as apparently envisioned, consistent with the interpretation of the Federal Power Act by this and other courts.

[10] The Commission artfully words its argument to imply, but not to state outright, that it has no authority to set *any* rates on other than a "just and reasonable", fully allocated cost basis.

## I.
## THE STRUCTURE OF THE ELECTRIC UTILITY INDUSTRY

### A. The Industry

In recent years, there have been several attempts by scholars and by regulatory agencies with jurisdiction over the electric utility industry to render a more detailed and precise description of this industry. Thus, the FPC in 1964 issued its *National Power Survey* (Government Printing Office, 1964), and in 1971 issued the *1970 National Power Survey* (GPO, 1971). These surveys sought in part, to describe the industry statistically as it was found by the FPC Staff in the years studied. In 1975, the Staff of the Nuclear Regulatory Commission (previously AEC) published an economic analysis of the industry, *Coordination, Competition, and Regulation in the Electric Utility Industry* (NRC Publication, NU REG75/061). In addition, a recent massive study by the Brookings Institution of regulated industry has produced further analyses of the industry, *e.g.*, *Antitrust and the Electric Power Industry*, Leonard W. Weiss, in *Promoting Competition in Regulated Markets* (Brookings Institution, 1975), and *Energy Regulation by the Federal Power Commission*, Bryer and MacAvoy (Brookings Institution, 1974).

From an examination of these sources, it appears that the situation here alleged is by no means atypical. Thus AP&L, a large investor owned utility, covers most of the State of Arkansas. It is, as well, a subsidiary of a public utility holding company, Middle South Utilities, which owns five operating electric companies[11] which are operated and dispatched as a single entity for the best advantage of the group. By far the largest proportion of AP&L's sales are at retail, but it has, as well, the nine wholesale customers here, municipally and

[11] In addition to Arkansas Power & Light Company, these are: Louisiana Power & Light Co. ("LP&L"), New Orleans Public Service, Inc. ("NOPSI"), Mississippi Power & Light Co. ("MP&L"), and Arkansas-Missouri Power Co. ("Ark-Mo").



cooperatively owned.[12] AP&L's retail sales area covers the vast bulk of Arkansas, and, with the exception of a portion of Mississippi County Electric Cooperative territory which is bounded by the retail area of AP&L's corporate sibling Ark-Mo, surrounds each of the customers here.

AP&L is the only source of electric power and energy at wholesale available to its wholesale customers.[13] AP&L owns all, or virtually all, of the electric transmission line in the area of Arkansas in which it exists, and thee is no other source of bulk power and energy presently available to the customers. Nor have the necessary coordination and transmission services been made available by AP&L to allow the customers to cooperate to furnish their own power and energy with any kind of generation that might obtain economies of scale; even if these services were available, lead time for a new fossil fuel generation unit of any size is now asserted to be six to eight years, with nuclear units requiring a yet longer lead time. Moreover, it may be noted that AP&L has long term contracts with its customers to furnish them with substantially all their bulk power supply.

AP&L has in the past, allegedly sought to acquire several of its wholesale customers. Nationally, between 1955 and 1965, 150 municipal utilities were acquired by surrounding larger utilities. Weiss, *op. cit.*, 165. Between 1962 and 1968, the number of municipally and cooperatively owned utilities declined by 58, and the number of smaller investor owned utilities declined by some 75. *1970 National Power Survey*, *supra*, at I-2-7. Thus it seems clear that the concerns expressed by customers here are not without basis. Moreover, as Professor Meeks has pointed out, as noted by the court below[14] (at 1268), in "Concentration in the Electric Power Industry: The Impact of Antitrust Policy," 72 Colum. L. Rev. 64, 78, (1972):

[12] According to the data originally filed by AP&L in the underlying docket, its wholesale customers *in toto*, accounted for 7.575% of the energy sold by it in the test year chosen by it. Included in that figure is some energy sold to other wholesale customers than the nine here.

[13] With one exception—Mississippi County—which is connected, as well, to transmission lines of AP&L's affiliate Ark-Mo in certain areas.

[14] And as cited with approval by this Court in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1973).

> "To illustrate, assume that a municipal system is buying all or most of its power from a neighboring private system. There exists between the two an indirect, but very real competition to serve their respective areas since the state commission or the voting public might well decide to allow the system that furnished the cheaper power to serve both areas. Unless the municipality has access to alternative sources of economical power . . . the neighboring system can virtually control the performance of the municipal system through its control over the wholesale price of power. . . . Such control by selling systems is probably very common and very effective, primarily because of the almost universal control over transmission by the dominant selling system in an area. This kind of 'unfair' competition is usually directed at municipals and cooperatives but also occasionally at small private systems, particularly when the seller is seeking to absorb the smaller system by merger."

This competition is especially severe if it reaches the stage where a purchasing publicly owned utility is forced to a choice of either 1) raising its industrial rates to a level higher than those in the surrounding area served by its wholesale supplier or 2) raising its residential rates to a level higher than those in the surrounding areas served by its wholesale supplier. If it adopts the first choice it may inhibit or stop industrial growth within its city or service limits, thus inhibiting or stopping additional jobs, tax base, and the general other effects, assumed to be beneficial, of additional jobs and payroll for the city. If it adopts the latter choice, experience has shown that it will not be long before a campaign begins to have the distribution utility sold to the supplier.

Obviously, if the differences in retail rates were a reflection of differences in costs, responsible city officials would have to give serious consideration to a proposal to sell a distribution utility that could not compete with its supplier as to retail rates. But where, as here, the differences are assumed to be a result of the decision of the supplying utility to discriminate against its wholesale customers to force a "price squeeze", the question is whether there is a proper remedy that will allow the customers properly to reflect their own economics.



## B. Rate Setting

The Commission seeks to leave the impression in its brief that electric rate regulation is not only precise but simple—a matter of finding the costs and adding them up in order to reach a rate appropriate for the service rendered. If this were so, of course, there would be little chance for a price squeeze to develop unless, as the Commission persists in here asserting, the Company had depressed its retail rates. But rate setting is much more complicated and sophisticated than one would infer from the Commission's presentation here, as the court below, referring (at 1274) to this Court's exposition in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951), recognized. AP&L is regulated at both the retail level (by the Arkansas Public Service Commission) and at the wholesale level (by the FPC). As AP&L recognizes (Brief, p. 17) a price squeeze can occur even if both jurisdictions actually did set rates in accordance with their own procedures. For example, policy decisions as to rate of return, treatment of taxes, *e.g.* "normalization" of certain taxes, allowances for funds used during construction, and selection of test year cost figures are among the major areas where Commission policy plays a far greater role than incurred costs in the determination of the rates ultimately allowed. For example, in 1973, the Commission moved to set rates based on projected future "test years" in which the cost data are estimated by the filing utility. Order 487, 50 FPC 125 (1973), rehearing denied 50 FPC 736 (1973). It is significant to note that in its order on rehearing, the FPC answered the contention that the use of the "future test period" would facilitate price squeezes against wholesale customers by asserting that "such an issue, if raised by a filing, cannot be dealt with summarily in a rule making and would require development at an evidentiary hearing." 50 FPC at 738.[15] In addition, the Commission has taken various steps toward allowing the utilization of "construction work in progress" in rate base, "normalization" of certain taxes, and varying other tax

[15] In each of the instances in which such a price squeeze has since been asserted, the Commission has refused to consider such evidence.

treatments. Each of these changes would increase the total rate that could be "justified" by an FPC proceeding, not because of an increase in costs, but because of FPC policy. There is also the problem of allocation between wholesale and retail costs and rate base. Here, for example, AP&L justified its rate when filed, in part, on the basis of an allocation method never before adopted by the FPC, which substantially increased the rates to the wholesale customers, and these customers are still paying on the basis of such an allocation.

Moreover, the FPC has, for several years, appeared to view its function as "taking the lead" in raising rates for electric utilities. See, *e.g.*, "Public Policy Innovations for the Electric Utility Industry, Remarks of Chairman Nassikas Before a Meeting of State Regulatory Commissioners and Federal Officials," September 11, 1974.[16] The FPC has pointedly, and repeatedly, attempted to change by its "leadership" not only its own methods of setting rates in ways designed to increase rates, but those of the states.

Initially, of course, the matter of rates and conditions of service is left to the seller and buyer to work out by agreement if possible. *E.g., FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1958); *Richmond Power & Light of the City of Richmond,*

[16] Indeed, the Remarks of Chairman Nassikas were delivered at a meeting with state regulators convened by Treasury Secretary Simon together with Chairman Nassikas. Secretary Simon was quoted by the most authoritative record of the industry, *Electrical Week* (McGraw Hill, Sept. 16, 1974) as telling the state regulators that "a good part of your challenge" was raising rates, as did the then Administration energy chief, John Sawhill. According to his released text, Commissioner Nassikas urged "very definite steps . . ." (at p. 9) for regulatory commissioners, including 1) the possible use of construction work in progress in rate base, 2) the use of "future test year principles as a means of reducing regulatory lag" (he noted that the FPC had already done this and thus would allow utilities to actually earn a higher rate of return), 3) following the FPC's switch from the statutory five month suspension period to suspensions of lesser period "including one day suspensions", 4) following the FPC which "permits utilities to compute the tax allowance for cost of service purposes on a normalization basis . . . [which] improves cash flow for utilities. . ." and 5) following the FPC in ". . . a wider use of fuel adjustment clauses."



*Indiana v. FPC*, 481 F.2d 490 (CADC 1973), certiorari denied 414 U.S. 1068 (1975). If there is no agreement upon such matters, the disputes are submitted to the FPC through the means of a rate increase filing by the supplying utility, and the FPC determines the lawful rate under Sections 205 and 206 of the Federal Power Act. The Commission has the right to examine rates to determine whether they are lawful in any event, of course, as part of its responsibility under the statute. But this responsibility is only brought into play, as a practical matter, by a rate filing by a supplier. Most state commissions have a similar procedure within which to work. Thus it is very easy for a utility to establish a wholesale rate level (at least subject to refund) which will remain in effect for a considerable period of time, simply by filing at the FPC. In this case such a filing was made at the FPC; no filing was made at the retail level for a considerable time thereafter.[17]

The problem of FPC delay is not insignificant. The decision in the underlying rate case here is not expected in the near future; indeed, the hearing is not yet over. Recently, the Commission entered an order finally directing refunds in a rate case that had been filed, and effective, more than five years before.[18] As the FPC stated, in its Order No. 487, amending the Regulations to allow the "future test year", 50 FPC at 127:

[17] Since the institution of the underlying proceeding, two retail rate filings and an additional wholesale rate filing have been made. A final order has been issued by the Arkansas Commission in the first retail rate case, and sustained by the state intermediate appellate court, substantially cutting the increase collected. An interim order disallowing certain proposed "costs of service" and cutting back substantially the rate increase asked for in the second retail rate case has been issued, and the remaining increase is still being tried. By contrast, the hearing is not complete in the underlying case here, and a superseding wholesale rate increase became effective December 1, 1975.

[18] *Municipal Light Boards of Reading and Wakefield, Massachusetts v. Boston Edison Co.*, FPC Docket No. E-7400, *et al.*, Opinion No. 729 (May 13, 1975), rehearing denied, Opinion 729A (August 4, 1975) consolidated appeals pending *sub nom Towns of Norwood, Concord and Wellesley v. FPC*, CADC Nos. 75-1821, *et al.*

> "Moreover, under the Federal Power Act and current filing regulations thereunder, electric utilities are permitted to file virtually any level of costs and rates and after a period of suspension charge these rates subject to refund, pending Commission decision."

Thus, in effect, the FPC has encouraged those electric utilities with wholesale customers to file inflated "costs of service" based upon any projected costs they desire, and any experimental methodology they can find a witness to sponsor, with some assurance that no refunds will have to be made for a significant period of time ("nigh interminable", as this Court observed in *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 389 (1959)).[19] Customers, in view of the price squeeze alleged, view this procedure with what may be understandable apprehension.

In addition to these substantive matters, there is a further matter of the length of suspension imposed. As Chairman Nassikas pointed out in his Remarks to the Meeting of State Regulatory Commissioners and Federal Officials, *op. cit.*, the FPC has tended to move toward a very limited, and frequently one day, suspension, rather than the five month suspension envisioned by the Federal Power Act. Since state commissions frequently suspend for much longer periods, and sometimes cannot allow higher rates until after decision, this in itself tends to encourage filings at the FPC, and the difference creates a price squeeze, which the FPC apparently views as irrelevant to its decision on the length of the suspension period.

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[19] We note, as well, that others perceive the problem of delay. In the *Report of the Committee on Appropriations*, S. Rep. 94-505, 94th Cong., 1st Sess., Dec. 4, 1975, the Committee on Appropriations noted, at p. 104:

> "The Committee is concerned over the continued lengthy delays involving many areas of the regulatory process, including what appears to be an inordinate amount of time required to litigate wholesale rate cases. The Committee does not believe the situation can be blamed on the lack of adequate staff. The Federal Power Commission should take immediate steps to reallocate personnel among the diverse activities if necessary to reduce the backlog and delay time. Timely decisions in the regulatory process would enhance and protect the overall public interest."



All of the above are areas where, in issues that could affect both federal and state agencies, the FPC has apparently attempted to take the lead in obtaining higher rates for utilities to the detriment of the wholesale customers.

In sum, a public utility can easily discriminate against the wholesale customer with which it competes at retail and which it seeks to drive from the business to its own advantage by choosing the timing and form of filing to take advantage of the FPC's apparent willingness to create by its policy "costs of service" that no state commission would allow.

## II.
## DISCRIMINATION

### A. The Law

One of the basic principles that has remained inviolate throughout the law, from historic common law to the present, is that when one holds a franchise, from the crown or the state, or otherwise has established a substantial monopoly control of a resource necessary for the functioning of a substantial part of society, he is bound to make that resource or the services associated with that resource available to all without discrimination, except as cost differences may justify. As Chief Justice Waite pointed out, in *Munn v. People of Illinois*, 4 Otto 113 (1877), in the course of an extensive review of the law providing for regulation of such monopolies,

> ". . . it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum charge to make for services rendered, accommodations furnished, and articles sold." *Id.* at 125.

Indeed, as the Court there noted (at 134):

> ". . . in matters which do affect public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the

charge to be reasonable, is itself a regulation as to price. Without it, the owner could make his rates at will, and compel the public to yield to his terms, or forgo the use."

As Mr. Justice Brewer stated for this Court in *Western Union Telegraph Company v. Call Publishing Company*, 181 U.S. 92 (1901), in upholding a decision awarding damages to one discriminated against, to the subsequent damage of its business, by the Western Union Company (at 99-100):

> "No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they may render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. but that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling."

The rationale for the common law prohibition against discrimination in these matters is clear. For to the extent that a necessary service is provided by one holding a monopoly or market dominance position, the use of that position to extract a non cost-justified differential in rates between users who, directly or indirectly, are competing with each other, directly undermines the ordinary risks and rewards associated with a market economy, in effect discouraging, to that extent, a more efficient enterprise from competing against a favored less efficient enterprise. To this degree, it is clear, discrimination by a utility or other "common carrier" deriving powers of eminent domain and market dominance from the state has always been unlawful. See, *e.g.*, *Alabama and Vicksburg Railway*



*Company v. Mississippi Railroad Commission*, 203 U.S. 496 (1906); *North Carolina Public Service Co. v. Southern Power Co.*, 282 Fed. 837 (CA 4, 1922) *appeal dismissed* 263 U.S. 508 (1924); *Postal Cable Telegraph Co. v. Cumberland Telephone & Telegraph Co.*, 177 Fed. 726 (M.D. Tenn., 1910).

As stated in *Salisbury & Spencer Ry. Co. v. Southern Power Co.*, 180 N.C. 422, 105 S.E. 28, 28-29 (S.Ct. N.C., 1920), a public service company enjoying the right of eminent domain may be compelled, by *mandamus*, to furnish electric current to the plaintiffs at the same rate, without discrimination, that the defendant furnishes it to other customers similar situated. In response to a contention that only a State Corporation Commission could alter the level of rates set by contract by the defendant company, the Court noted:

> "No public service corporation engaged in public employment can successfully sustain such a position. The court possesses ample power to prevent discrimination in rates by all public service companies, and it cannot be doubted that mandamus will lie to compel the defendant to furnish service to the consuming public without discrimination. This power is inherent in the courts and exists independent of the Corporation Commission, or even statutory law. It is derived from common law."

The court went on to quote this Court's decision in *Missouri P.R. Co. v. Larabee Flour Mills Co.*, 211 U.S. 612, 619 (1909):

> "Whenever one engages in that business, the obligation of equal service to all arises; and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts."

Thus the court concluded on this issue (at 29-30):

> "The fact that the Corporation Commission has the power and authority to fix the rates at which the defendant shall sell its current and energy to all consumers connecting with its lines in no wise precludes the courts from preventing the defendant from making unlawful discriminations in rates charged for the same, or substantially similar service. The Corporation Commission itself has no power to authorize such a discrimination, and if it appears to the court that an unlawful discrimination exists, it can be corrected by mandamus without regard to whether it results from a contract imposed by the defendant directly or otherwise."

Thus, that court held (at 31):

"It will not be difficult for the court, upon the hearing, to determine the lowest rate charged by the defendant for current and power furnished cotton mills, factories, municipalities, or other public service companies, under the same or substantially similar conditions. The lowest rate thus established will automatically become the proper rate to be charged the plaintiffs for such service. Otherwise, the defendant will still be unlawfully discriminating against the plaintiffs."

The court went on to note that, *ibid.*:

"By the application of this doctrine the court does not fix defendant's rates, but simply adopts the lowest rates which the defendant power company itself has fixed for the same, or substantially similar service. . . . This does not interfere with defendant's applying to the Corporation Commission at any time to fix the rates it shall be permitted to charge these plaintiffs and other customers of current receiving such service, but neither the Commission nor the defendant can fix rates that unjustly favor one consumer over another. The courts are always open to prevent this kind of discrimination, and, manifestly, the only way to prevent discrimination is to require the defendant to furnish current to these plaintiffs at exactly the same price it has fixed by contract to other consumers under substantially the same circumstances."

We note, as well, the recognition by Mr. Justice Shiras for this Court in *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U.S. 197 (1896), at 211, in discussing the problems of control of railroads prior to the enactment of the Interstate Commerce Act, that "relief to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers —particularly that one which requires uniformity of treatment in like conditions of service."

For, as this Court noted in *Union Pacific Ry. Co. v. Goodridge*, 149 U.S. 680, 690-691 (1893):

". . . it is no proper business of a common carrier to foster particular enterprises or to build up new industries, but deriving its franchise from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality."

The rationale for the obligation upon public service companies to serve without discrimination is well stated in



*Western Union Telegraph Co. v. Call Publishing Co., supra*, and has long been applied, at common law, to other "businesses affected with a public interest". As the North Carolina Supreme Court noted in *Salisbury & Spencer Ry. Co. v. Southern Power Co.*, 179 N.C. 19, 101 S.E. 593 (S. Ct. N.C., 1919) at 599, "It is of the highest importance that the claims of the defendant Southern Power Company to discriminate in the rates charged by it to purchasers under like conditions shall be clearly denied by the courts." In response to a contention that defendant had no duty to sell to competing distribution systems, the court responded, *ibid.*, that when defendant had chosen so to do;

". . . it dedicated its property to this particular class of public use, and cannot discriminate in charge or service between the several members of this class, for this would be a license to discriminate among cotton mills as a class, furniture factories, etc."

• • •

It is well settled that the common-law obligation of equal and undiscriminating service clearly requires that the same charges shall be made to all consumers for the rendering of similar service."

The Court went on, *ibid.*, to quote substantially from the succinct statement of grounds of decision by this Court in *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U.S. 92, at 99-100 (See p. 18, *supra*), and, citing *Postal Cable Telegraph Co. v. Cumberland Telephone & Telegraph Co.*, 177 Fed. 736, (M. D. Tenn., 1910), concluded that, *ibid.*,

"This obligation cannot be evaded, even though the purchaser of the current may be to some extent a competitor."

As the court went on to note (at 603), since defendant had access to low-cost power not, as a practical matter, available to the plaintiffs:

"the power the defendant claims of unrestricted rates and of absolute right to discriminate between purchasers would make it a despotism beyond a parallel in history."

In most of the cases discussed *supra*, the primary concern was the avoidance of discrimination between competing purchasers of goods or services rather than the aggrandizement of the discriminator furnishing those goods or services.[20]

[20] But see *Salisbury & Spencer Ry. Co. v. Southern Power Co.*, 179 N.C. 19, 101 SE 593 (S.Ct. N.C., 1919).

This concept goes far beyond the area of utilities and common carriers; to the extent that there is economic rationale for the Robinson Patman Act, 15 U.S.C. 13a, it is the same rationale —that growth of economic units should not be unfairly impeded or advanced by non cost-justified discrimination with respect to essential services.

The principle of refusing to allow a holder of a market dominance position unfairly to use that power to his own advantage is evident in other areas in the "tying" cases under the Sherman Act, *e.g., United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *International Salt Company v. United States*, 332 U.S. 392 (1947). Thus it is clear that the holder of a monopoly or market dominance position in one area may not use that dominance to gain a competitive advantage or foreclose competition in other areas. *United States v. Griffith*, 334 U.S. 100, 107 (1948); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973).

It is clear as well, in a horizontal competition situation, that one or some of a group of competitors, having access to a non-patented instrument of market dominance or "bottleneck", cannot use that instrument to the economic detriment of their competitors without making it available on the same terms to all. *E.g., United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912); *Associated Press v. United States*, 326 U.S. 1 (1945); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

The situation here alleged, however, is that of a "price squeeze" which occurs in vertically integrated situations, where a holder of market dominance at one level (*e.g.*, the holder of the bottleneck transmission which precludes other competition) discriminates, for its own ultimate advantage and aggrandizement, against its wholesale customers and in favor of its own retail customers. This situation, as well, as the Commission concedes (Brief, p. 42), is clearly unlawful under the antitrust laws. *United States v. Aluminum Company of America*, 148 F.2d 416 (CA 2, 1945); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 368-369, 375 (1927).

Thus, the situation here alleged, as shown by the discus-



sion above, may be seen to fall within that great body of the law precluding discrimination by one with market dominance, and utility power, to its own benefit and the detriment of its competitors. Indeed, because of the control both of the retail and wholesale rates (at least to the extent of filing) the situation here is perhaps among the most serious of those with which the body of law above discussed is intended to deal.

### B. Remedy

Traditionally, of course, both at the FPC and at common law, when discrimination, either in service or rates, was charged, the remedy was quick and simple: unless a cost differential to serve was alleged and proved by the utility discriminating against the complainant, that utility would be ordered to lower its rates to the complainant to that charged to the favored customer.[21] The leading FPC case on this issue, *Otter Tail Power Co.*, 2 FPC 134 (1940) is directly in point and the decision speaks directly to the inference sought to be raised by the Commission before this Court (Brief, at page 32) that its only duty is to ascertain the wholesale rate which recovers the cost of wholesale service plus a reasonable return. As the Commission there noted, in opening its discussion on the law, that case, as this, involved "what is frequently termed a 'discrimination case' as distinguished from a 'rate case' " (at 135). The Commission found that Otter Tail Power Company had voluntarily made a series of different wholesale rates to different customers under substantially similar conditions (at 141). The Commission discussed the rate differentials apparent on the record, and held (at 142):

> This is clearly illustrative of the genesis of the vice of discrimination which regulatory commissions are almost uniformly directed to remove by the statutes under which they operate. As a matter of fact, the evil of discrimination was one of the prime motivating factors of the earliest regulatory statutes. The economic consequences of discrimination were well noted in *Griffin v. Maine Central Railway Company*, PUR 1916-A, 27, 28, where it is stated:

[21] See *Western Union Telegraph Co. v. Call Publishing Co.*, *supra*, and other cases cited, *supra*.

'Unquestionably of the two evils discrimination in rates is more offensive than excessive rates because within reasonable limits shippers can adjust themselves to higher rates, but not to unequal rates.'

We need not go into the long history of abuses, discriminations, preference, rebates, etc., which were the primary cause of the inhibition against this form of practice in the railroad regulatory statutes. [Footnote omitted] The inhibitions originally written into these statutes were substantially carried over into practically all of the utility regulatory statutes.

There is one other phase of discrimination which we should mention. Given a monopolistic position and the right to discriminate, an electric utility company is in possession of a strong unfair weapon in its dealings with municipalities. The facts of this case point clearly to the manner in which this may come into play."

The Commission then went on to discuss Otter Tail's rationale for the differential in rates to the first of several villages and towns. The Commission noted that (at 143) "it appears in large part that the reason the rates were maintained at such a high level was to force the village out of ownership of its distribution system and to require it to dispose of its faiclities to the respondent. . . ." The Commission went on to note that that policy had in fact been successful, and the Village of Marvin had been forced to dispose of its distribution system to Otter Tail (at 144).

The Commission went on to deal with the contention of Otter Tail (at 145) that the Commission could not require service to all customers similarly situated, at the lowest rate (the Fergus Falls rate) set by Otter Tail, since, Otter Tail contended, "the record shows affirmatively that the rates would not only be unjust and unreasonable but confiscatory." As the Commission noted, however, "this contention would appear to require this Commission, before being able to remove a patent discrimination, such as here exists, to conduct a complete 'rate case'. To accept such a construction of the applicable provisions of the Federal Power Act would be to render it ineffective for the reasonable accomplishment of its intended purposes." *Ibid.* The Commission went on to note, and accept, *arguendo*, the contention by Otter Tail "that it is now selling energy to Fergus Falls at less than cost". *Ibid.* The



Commission initially noted (at 146) that Otter Tail

". . . itself, fixed the Fergus Falls rate and there is nothing before us to show that the respondent voluntarily undertook to serve Fergus Falls under such conditions as would result in confiscation of the respondent's property. In this connection we are reminded, as Mr. Justice Cardozo pointed out in *Dayton Power & Light Company v. Public Utilities Commission*, 292 U.S. 290, 312, that:

'It is a strain on credulity to argue that the appellant, when putting into effect a new schedule of charges, was satisfied with one productive of so meager a return *** The argument proves too much; *** Men do not transact business without protest at confiscatory rates, at all events in the absence of extraordinary circumstances making submission to the loss expedient ***' ".

The Commission discussed at some length the principles of utility regulation and common law, and the court decisions thereon, particularly the cases of *Salisbury and Spencer Railway Company v. Southern Power Company*, 101 S. E. 593 (S. Ct. N.C., 1919), 102 S.E. 625 (1920), 105 S.E. 28 (1920); *North Carolina Public Service Company v. Southern Power Company*, 282 Fed. 837 (CA4, 1922); *Western Union Telegraph Company v. Call Publishing Company*, 181 U.S. 92, 100 (1901); *Alexander Sprunt & Son v. United States*, 23 F.2d 874, 878 (S.D. Tex., 1927)[22] Each of these cases, as the Commission viewed them, held that the adoption of a rule to remove discrimination was not tantamount to an order fixing the just and reasonable rate, but so long as the supplier voluntarily maintained a lower rate to a customer in the same class, all other customers were entitled to that rate (at 148). The Commission held (at 149):

"A common sense construction of Sections 205 and 206 of the Federal Power Act impels us to accept the principles announced in the foregoing cases as being equally applicable in solving the problems with which we are confronted in this case.

It occurs to us that one rate in its relation to another rate may be discriminatory, although each rate per se, if considered independently, might fall within the zone of reasonableness. There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned. The

[22] See also same case at 281 U.S. 249 (1930).

relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed.

For the purpose of removing a discrimination we interpret the statute to mean that the reasonable wholesale rate for any class of customers be no higher than the lowest rate charged by vendor utility to any customer for the same class of service under the same or substantially similar conditions. If a complete 'rate case' is to be conducted before the patent discrimination existing in the instant case is to be removed, such would obviously place a strained construction on the Act and render it ineffective for the expeditious removal of unjust discriminations."

This interpretation of the Act, at the inception, see also, *Gulf States Utilities Co.*, 1 FPC 522 (1938), by the agency charged with jurisdiction thereunder, and uniformly followed since,[23] would be entitled to judicial acceptance, even in the absence of the uniform line of cases, *supra*, to the same effect. *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945); *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153-154 (1946); *Power Reactor Development Co. v. Electricians*, 367 U.S. 396, 408 (1961); *Udall v. Tallman*, 380 U.S. 1, rehearing denied 380 U.S. 989 (1955). Thus it is clear that, in a discrimination case, into which class the instant price squeeze case falls, the remedy is simple and uniform: no cost of service "rate case" need be decided in order to afford expeditious relief against the discrimination. To the extent that a cost of service rate case demonstrates that a further lowering of the wholesale rates is necessary, that can abide the result of the lengthy rate case.

## III.
## THE COMMISSION IS EMPOWERED, AND DIRECTED, TO DEAL WITH THE SORT OF PRICE SQUEEZE HERE ALLEGED

We have demonstrated the sorts of discrimination and price squeeze that can and do occur in this industry, and the underlying common law and statutory law which would, but

[23] *E.g., Wisconsin Michigan Power Co.*, 31 FPC 1445, 1450-52 (1964).



for the Federal Power Act, plainly apply. thus it is clear, as the Commission does not contest, that if the allegations made by customers are true, the customers could resort to the courts under common law to recover single damages, or under the antitrust law to recover treble damages for the price squeeze or discrimination alleged.

The Commission contends that it need not even consider the discrimination and price squeeze here alleged because, it suggests, the framers of Part II of the Federal Power Act failed to give it authority to deal with discrimination when the lower of the rates involved in the discrimination is a retail rate.

Thus the issue is framed in its starkest terms: did the passage of Part II of the Federal Power Act remove the pre-existing remedies and protections allowed a customer against discrimination by an electric public utility intended to, and having the effect of, driving the customer out of business?

It may not be out of place for the customers to observe, prior to addressing the Commission's arguments on their merits, that the Commission seems to have lost sight here of the fact that the rate jurisdiction of the Federal Power Commission under the Federal Power Act and the Natural Gas Act was granted it to protect the *purchasers* of power in interstate commerce at wholesale and was framed so as to afford these customers a complete, permanent and effective bond of protection from excessive rate charges. *E.g., Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959).[24] It was the intention of Congress that power be sold in interstate commerce for resale at the "lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." *Ibid.*

### A. The History of Part II Shows No Intent To Remove Any Kind of Protection That Would Previously Have Been Available.

Part II of the Federal Power Act was passed as Title II of the Public Utility Act of 1935, Title I of which was the Public Utility Holding Company Act of 1935. 49 Stat. 803. The

[24] Also see, *e.g., California Electric Power Co.*, 10 FPC 152, 162 (1951).

history of these two titles was inextricably intertwined, but it is very clear that the sort of competition for new or increased load underlying this proceeding was very much in the mind of the Congress. For example, the Public Utility Act of 1935 was passed consequent to the receipt by Congress of, and with regular reference to, the multi-volume study of the utility industry which had been completed on reference from the Congress by the Federal Trade Commission. S.Doc. 92, 70th Cong., 1st Sess. Cf 15 USC 79a(b). At Part 73-A, pp. 51-53, the Federal Trade Commission recognized, in the clearest of terms, the competiton that existed between adjoining utilities for new load, and the pressures that would be brought upon the higher cost supplier. That Commission concluded in general that, because of the existing judicial interpretation of the Sherman Act and the weakness of the then existing Clayton Act, these Acts were insufficient to deal with the problems caused in large part by the holding companies which eliminated competition among the operating utilities which they controlled, notwithstanding the existence in the industry of substantial and important intra-modal competition which ought to be preserved. Id, at 47-56.

The history of the passage of both Titles of the Public Utility Act of 1935 shows, as both this Court and other courts have noted, that ". . . the theme of elimination of 'restraint of free and independent competition' . . . runs throughout the Act." *SEC v. New England Electric System*, 384 US 176, 183 (1966); *Municipal Electric Ass'n of Massachusetts v. SEC*, 413 F.2d 1052, 1057 (CADC, 1969). See also, e.g., *City of Pittsburgh v. FPC*, 237 F.2d 741 (CADC, 1956); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953 (CADC, 1968). This need for the protection of competition is obviously even greater, of course, where, as here, there is a dual customer-competitor relationship.

The Commission has recognized this problem in earlier years. For example, in Hearing Before The Committee on Commerce, United States Senate, 89th Congress, 1st Sess., on S. 218 (Serial No. 89-38, 1965) at page 68, the then Chairman of the Federal Power Commission testified:

> "To the large privately-owned electric utility a retail customer, even a large industry, is simply a customer. However, a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a



> competitor in the fringe area where the two systems are contiguous, but may also be a direct or potential competitor for the commercial and industrial businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.
>
> The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipal systems succumb to purchase offers by investor-owned wholesale suppliers. In this respect wholesale rate regulation in the electric power industry is unique and faces far greater resistance by the privately-owned utilities than retail ratemaking. . . . The Nation values its pluralistic power economy and the role therein of the independent small-systems, public, cooperative, and investor owned. The necessity for Federal regulation to assure the survival of these small and medium-sized power systems is unmistakable."

The passage of Part II of the Federal Power Act thus was not intended to override the protection which would otherwise be afforded by the antitrust laws. As this Court held in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973):

> "There is nothing in the legislative history which reveals the purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.

Thus, it is clear that the illegality of a price squeeze of this nature continues to exist.

### B. Part II of the Act Vests the Commission with the Authority to Deal With This Sort of Discriminatory Pricing.

Were it not for the hesitancy it now expresses, it would seem clear that the Commission has the responsibility to deal with the issue of price squeeze under its rate regulations pursuant to Sections 205 and 206 of the Act. As this Court noted, in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758-759 (1973):

> The Act had two primary and related purposes: to curb abusive practices of public utility companies by bringing them

under effective control, and to provide effective federal regulation of the expanding business of selling and transmitting electric power in interstate commerce. . . .

The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of anti-trust enforcement to restrain the growth and practices of public utility holding companies. . . .

In order to achieve Federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit. II was enacted. . . .

Title II certainly did not preclude the operation of the antitrust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy 72 Col. L. Rev. 64 (1972). *This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant* to . . . like *directives contained in §§205, 206* . . . The Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry." [Emphasis added]

Moreover, the decision of this Court in *Gulf States, supra*, is entirely consistent with the representation in this regard made to this Court by the Commission in its brief in that docket (brief for the Federal Power Commission in support of petitioner, Supreme Court Docket No. 71-1178). For example, at page 7 of that brief, the Commission represented that "in exercising its control over—rates, practices, and services of public utilities, the Commission has full authority to consider antitrust allegations and to prevent or remedy antitrust violations related to such matters." Further, the Commission, at page 13 of its brief, stated:

> ". . . allegations of anticompetitive conduct would be properly raised and fully considered by the Commission in proceedings . . . to review rates under Sections 205 and 206, . . . to review charges of unduly discriminatory rates or practices under Section 205. . . . Under each of these Sections the Commission has jurisdiction to compel certain action by a public utility. If anticompetitive conduct or effects were established in such proceedings and were not outweighed by other factors which determine public interest, the Commission



> could order a remedy directly related to the facts proven, *e.g.*—order a change in rates, etc."

And, at page 15, the Commission represented that "antitrust allegations can be relevant in proceedings . . . to approve . . . rates or practices of public utilities, . . . because monopolistic or discriminatory practices can be directly prevented or remedied in all these matters." See also, Commission brief at pages 12, 13, and 19. Thus, not only do the antitrust laws apply, outlawing the sort of price squeeze here alleged, but the Commission has correctly represented to the Court that it is required to enforce those laws in the course of its responsibilities under these very Sections of the Power Act.

Nor should there be any serious question about the Commission's power to regulate wholesale rates by decreasing them to allow the wholesale customers fairly to compete with their suppliers for retail business. Section 205(b) of the Act reads:

> "No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

This language would appear clearly to grant the Commission power to lower the wholesale rate subject to its jurisdiction in order to eliminate the unreasonable difference between classes of service here alleged. Section 205(b) does *not* say, as the Commission would apparently have it, that "no public utility shall, *but only when both sales are subject to the jurisdiction* of the Commission, (1) make or grant any undue preference or advantage. . . ." Rather, when the sale complained of is subject to the jurisdiction of the Commission, the Act requires the elimination of any undue preference to any person. It should be noted in this regard, that Section 206(b) expressly provides for the Commission to determine costs of certain non-jurisdictional sales, and this authority obviously ties back to the Commission's authority under Section 206(a) to eliminate discrimination. Moreover, Section 209, 16 U.S.C. 824h, expressly provides for methods of acting jointly with state commissions should joint action be necessary.

The Commission, however, at considerable length, recounts those portions of the extensive legislative history of the Public Utility Act of 1935 most favorable to its current views to support its contention that Congress withdrew the power to eliminate discrimination against the class of wholesale customers which it was established to protect. (Brief pp. 12-23). The difficulty with that argument is that, if carefully examined, it merely demonstrates the correctness of the decision below. In order to understand the legislative history here relevant, however, it is necessary to examine a portion of the history of railroad regulation by the ICC prior to 1935.

Although the Transportation Act of 1920 expressly gave the Interstate Commerce Commission the authority to remove undue or unreasonable preferences as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, the cases decided under Section 3 of the Act to Regulate Commerce[25] are directly relevant to the history here. For example in the *Shreveport* case, *Houston, East & West Texas RR Co. v. United States*, 234 U.S. 342, 356-357 (1914), this Court, in dealing with an order of the ICC directing a carrier to cease discrimination against interstate commerce caused by a very low intrastate rate within Texas while a higher rate was charged for interstate carriage to Texas from Louisiana under the same conditions, stated, in regard to a very similar nondiscrimination provision:

> "There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by relation of intrastate to interstate rates as maintained by the carrier. . . .
>
> Congress thus defined the scope of its regulation, and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrasate rates, and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states."

[25] Section 3, 24 Stat. at L. 379, 380.



However, where there was a discrimination created by the relationship between intra and interstate rates, the Court held, the ICC was authorized to order elimination of the discrimination by modification of the intrastate rate, if necessary.

As this Court stated in *American Express Co. v. State of South Dakota*, 244 U.S. 617 (1917), at 625,

> "Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the discrimination. But where, as here, there is a conflict between the Federal and the state authorities, the Commission's Order cannot serve as a justification for disregarding a regulation or order issued under state authority, unless, and except so far as, it is definite as to the territorial points to which it applies. For the power of the commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic."

Thus, it appeared clear that under *Shreveport* and its progeny, the ICC was entitled, in order to eliminate discrimination, to regulate and modify intrastate rates for transportation otherwise exclusively within the jurisdiction of various state Commissions. It was this concern—that the Federal Power Commission might, under *Shreveport* like powers, control intrastate rates otherwise set by the state regulatory commissions—that engendered the debate of which a portion is set forth in the Commission's brief here. For example, H. Lester Hooker, Chairman of the Legislative Committee of the National Association of Railroad and Utilities Commissioners, *Hearings before the Committee on Interstate and Foreign Commerce*, House of Representatives, 74th Congress, First Session, on H.R. 5423, Part III, at p. 1619, complained that under the proposed bill,

> ". . . the Federal agency will have authority to come into the States and where the intrastate rates are lower than interstate rates, increase the intrastate rates to the level of interstate rates, as the Interstate Commerce Commission does today with our railroad rates."

See also Statement of John E. Benton, General Solicitor of the National Association of Railroad and Utilities Commissioners, *Id.*, at 1620, *et. seq.* Mr. Benton went on to discuss, at 1623-1625, 1630-1638, how the states had lost jurisdiction to the ICC in setting railroad rates under the effects of the *Shreveport* doctrine. Thus, he stated, *id.*, at 1629:

> "We ask that with respect to electric companies the Federal Government provide regulation for wholesale interstate rates, which are beyond the reach of the State commissions, complete and adequate regulation; . . . we ask that the Federal Government withhold its hand from regulating that part of the business of these companies which is local, which has been held by the Supreme Court to be now under the jurisdiction of the State commissions."

It was, of course, these problems to which the amendments to the original bill referred to by the Commission were addressed. Thus, Senate Report 621, 74th Cong., First Sess., at p. 18 noted that:

> "Part 2 places the utilities under the regulated conditions which have been prescribed for the principal other national utilities."

In discussing the material differences between the bill reported and the bill as originally introduced, the Committee on Interstate Commerce noted that, *ibid.*:

> "The revision has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters."

The House Committee as well, in its report, H.R. Report 1318, 74th Congress, First Session, at pp. 7-8, noted the necessity for federal control of interstate transmission and sale of electric power because of the decision of this Court in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that:

> ". . . the rates charged in interstate wholesale transactions may not be regulated by the States."

Thus, the House Committee noted (*ibid.*):



> "Part II gives the Federal Power Commission jurisdiction to regulate these rates. A 'wholesale' transaction is defined to mean the sale of electric energy for resale and the Commission is given no jurisdiction over local rates even where the electric energy moves in interstate commerce."

The Commission quotes (Brief, pp. 15-16) an exchange between Representative Pettengill and Solicitor DeVane before amendment of the bill, to the effect that the interstate rate would need only to be determined upon its reasonableness. It must be recognized, however, that Mr. DeVane was discussing a bill which would have automatically required all electric utilities to transmit wholesale power from any source to any customer desiring it, and thus under that bill, there would have been ample competition with regard to wholesale rates, so that no price squeeze could be effective.

It will, moveover, be noted that the colloquy between Representative Cole and Chairman Seavey of the FPC quoted by the Commission (Brief, pp. 17-18), simply supports the decision of the Court below, and indeed a point agreed to by all parties—that the FPC has no authority to *modify the retail rates* charged by AP&L. This does not, of course, in any way conflict with the holding below that the FPC has ample authority to deal with price squeeze by directing its action, in accord with historic common law precedent, to lower the higher interstate rate over which it has unquestioned jurisdiction.

Thus, it can be readily seen that Congress, in the passage of Part II of the Federal Power Act had no intention of reopening, or as the Commission would have it, expanding, the "Attleboro gap".[26] For, as this Court made clear in *FPC v. Southern California Edison Co.*, 376 U.S. 205, 216 (1964), Congress acted on the passage of Part II of the Federal Power Act by making "FPC jurisdiction *plenary* and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." [emphasis supplied]. As this Court noted in *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 458 rehearing denied

[26] Created by *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

405 U.S. 498 (1972), Part II was intended completely to close the "Attleboro gap" and to put all functions of public utilities under either state or federal regulation.

The Commission urges that it has somehow, by non-user, lost its power to prevent discrimination.[27] This is precisely the sort of "attractive gap" in regulation that this Court, in *FPC v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 20-22 (1961); and *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 369-370 (1965) has determined Congress did not intend to leave in the passage of Part II of the Act. As the Court below correctly noted (at 1272):

> "A legislative intention to achieve such a regulatory gap is not to be presumed unless expressly presented. United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 . . . (1965); Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682-83 . . . (1954)."

[27] We note, however, that the Commission's citation of cases to this effect fails to cite some of its cases that might be relevant. While it is true that in *Jaspan v. Philadelphia Electric Co.*, 1 FPC 561 (1938), the Commission indicated that it would not *raise* a wholesale rate otherwise found to be a just and reasonable rate in order to eliminate discrimination against a higher retail rate, thus remitting petitioner to the remedies available under Pennsylvania law to decrease the higher discriminatory retail rate, the necessary corollary of that decision would appear to support the decision below. Moreover, in *Pacific Gas & Electric Co.*, 13 FPC 200 (1954) reversed on other grounds, 350 U.S. 348 (1956), the Commission at 209 held that the lower wholesale electric rates (*which it considered to be nonjurisdictional intrastate rates*) available to certain cities did not amount to an undue preference vis-a-vis the higher rates charged to Sierra Pacific Power Company:

> ". . . as it does not appear from the record . . . that either Sierra or the ultimate consumers served by it will suffer any competitive disadvantage by reason thereof. . .".

Thus, it appears clear that the Commission has construed its authority in these matters to extend to a discrimination imposed against jurisdictional customers by rates which it construed to be non-jurisdictional. See also, *Home Gas Co.*, 13 FPC 241, 267 (1954), where the Commission found a proposed wholesale rate design to be discriminatory vis-a-vis the company's retail sales. See also, *Wisconsin Michigan Power Co.*, 31 FPC 1445 (1964) where the Commission, at 1451, relied upon a rate argued by one of the parties to be non-jurisdictional in order to find an unlawful discrimination, which it directed be ended.



In analogous situations, we note that the Commission, without recognizing inconsistency, has embarked upon a program, utilizing similar statutory authority, to remedy discrimination in pipeline gas allocations between direct retail customers, the regulation of sales to whom has heretofore been left to the states, and the jurisdictional wholesale customers. This Court, in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972) addressed the issues of the Commission's powers in terms directly applicable here; especially when it is noted that the Natural Gas Act and Federal Power Act grew out of the same judicial history and legislative history. *FPC v. Southern California Edison Co.*, 376 U.S. 205, 211 (1964). This Court noted, *LP&L* at 631, that the Natural Gas Act granted the FPC broad powers "to protect consumers against exploitation at the hands of natural gas companies . . ." and that "to that end, Congress 'meant to create a comprehensive and effective regulatory scheme' . . . of dual state and federal authority."

> "Although federal authority was not to be exclusive, FPC regulation was to be broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare. This Congressional blueprint has guided judicial interpretation of the broad language defining FPC jurisdiction, and 'when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. [citation omitted] That is to say, in a borderline case where Congressional authority is not explicit we must ask whether the state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs' ". [citation omitted].

After concluding that state authority could not practicably regulate to prevent inequity and hardship in such matters, this Court addressed the argument of LP&L that the Commission could not reach, or consider, the direct sales as a jurisdictional matter. After reviewing the history of the problems which had occurred as a result of the "Attleboro gap", this Court noted (at 639):

> ". . . Congress enacted a federal 'sales' jurisdiction in the Natural Gas Act, by which Congress granted *rate-setting* authority to the Commission over all interstate sales for resale.

. . . Congress withheld *rate-setting* jurisdiction over direct sales. That rate-setting was the only subject matter covered by 'sales' jurisdiction and the 'direct sales' exception is clear from the legislative history. . . ."

This Court concluded, at 640-641:

"Thus, Congress' grant of sales jurisdiction as to sales for resale and the prohibition as to direct sales were meant to apply exclusively to *rate-setting*, and in no wise limited the broad base of 'transportation' granted the FPC. That head of jurisdiction plainly embraces regulation of quantities of gas that pipelines may transport, for in that respect Congress created 'a comprehensive and effective regulatory scheme' [citation omitted] to 'afford consumers a complete, permanent and effective bond of protection. . .' . . . Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation."

Thus it seems clear that, under the rationale of *LP&L*, the only power withheld from the Commission was the power to set retail rates. This is in accord with the legislative history, *supra*, which makes clear that the only power sought to be withheld from the FPC in discrimination cases that the ICC had was the power to modify *retail* rates. Thus the Commission would have authority to deal with the price squeeze here by using the traditional remedy of lowering the higher, offending, jurisdictional rate. The head of discrimination authority would plainly so allow, regardless of whether the Commission were precluded from modifying the lower retail rates.[28]

If there were any question as to the Commission's ability so to act, it would have been resolved by this Court in its decision in *Panhandle Eastern Pipe Line Co. v. FPC*, 324 U.S. 635, 646-47 (1945), interpreting the analogous section of the Natural Gas Act, Section 5(a), 15 U.S.C. 717d(a):

"The Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration

[28] We note that in many of the cases cited in Section II of this Brief, *supra*, the courts or regulatory agencies could not modify the lower, contract rates against which discrimination was measured; nonetheless, there seemed little question that the higher, discriminatory rate could be lowered to eliminate the discrimination.



when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction. For Section 5(a), 15 U.S.C. 717d(a), provides that whenever the Commission 'shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential*, the Commission shall determine the just and reasonable rate.' [Italics added by the Court]. It is clear that contracts covering direct industrial sales come within that italicized clause of Section 5(a)."

The Commission views the *Panhandle* language as inapposite for reasons that are not wholly clear but appear to boil down to an assertion that because the issues there were somewhat different, the language is somehow not in point. Unfortunately for its position, however, at pp. 22-23 of its brief to this Court in that case, the Commission expressly told this Court that the discrimination clause in the Natural Gas Act applied to direct industrial sales vis-a-vis jurisdictional sales.

Moreover, the Commission has in the past expressly set jurisdictional rates under the Natural Gas Act to allow competition with non-jurisdictional gas and other fuel rates, recognizing that the jurisdictional rates may be set below what the Commission might otherwise considerable to be just and reasonable. See, e.g., *Florida Gas Transmission Co.*, 47 FPC 341, 366-368 (1972).[29] It is difficult, if not impossible, to see how these actions on the part of the Commission square with its present insistence that (JA53) "wholesale rates must recover allocated wholesale costs".[30]

[29] The Commission (Brief, p. 23, n. 19) distinguishes that decision because, it states, that rate "was not, as Conway implies, imposed by the Commission" We note that the Commission has apparently forgotten that, as it correctly characterized the circumstances of that case at the time, 47 FPC at 381, "Here we are *prescribing* a higher I rate, but any deficiency below fully distributed costs will still be absorbed by other jurisdictional services." [emphasis added].

[30] Obviously there are many instances in which the lawful rates may not "recover allocated wholesale costs." In addition to the discrimination cases, *supra*, and the competitive source pricing cases, *supra*, there are the cases where the rate is fixed by contract not subject to change. *E.g.*, *FPC v. Sierra Pacific Power Co.*, *supra*; *Richmond Power & Light of the City of Richmond, Indiana v. FPC*, *supra*.

It may be noted, as well, that this Court in *American Trucking Associations v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397 (1967), rehearing denied 389 U.S. 859, has recently concluded that the ICC's anti-discrimination authority clearly requires that, if railroads offer certain services to their customers, they must offer those services as well to their competition on a non-discriminatory basis even if the ICC could not require the inter-modal transportation thus resulting to be offered absent the discrimination.[31]

## IV.
## ANTIDISCRIMINATION PROVISIONS UNDER PART I OF THE ACT

As we have seen, there is little, if any, support for the Commission's strained reading of Sections 205 and 206. An additional complication which the Commission has sought to sidestep is the interaction of the antidiscrimination provisions of Part II of the Act with those of Part I of the Act.[32] For Section 20 of the Act, 16 USC 813, provides:

> "That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a Commission or other authority to enforce the requirements of this section within such State . . . jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefore as constitute interstate or foreign commerce. . ."

[31] Note also that this Court has held, in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), rehearing denied, 348 U.S. 932 (1955), that the prohibitions of the Robinson-Patman Act apply to price cutting in intrastate commerce even when no cuts or other actions are made in interstate commerce.

[32] Part I of the Act applies generally to licensees of hydroelectric projects, including AP&L.



Section 19, 16 USC 812, further provides that, as a condition of a hydroelectric license under Part I, if a state has not authorized and empowered a commission to regulate and control the services to be rendered by a licensee or the rates and charges of payments therefor, jurisdiction is conferred upon the Commission to exercise such regulation and control until such time as the State shall have provided a commission or other authority for each such specific matter of regulation and control. Obviously, it makes little or no sense to read Sections 205 and 206 to exclude FPC jurisdiction over the sort of price squeeze here alleged, since it seems clear under *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964) that no state can have jurisdiction to act against a price squeeze by lowering a wholesale customer's discriminatory rate.[33] If that is the case, then by virtue of Sections 19 and 20, the Federal Power Commission is automatically granted authority under Part I to eliminate the discrimination because of its refusal to do precisely that under Sections 205 and 206. We are aware of nothing in the legislative history or cases under the Act to require such a round about method of acquisition of jurisdiction by abnegation.

## V.
## THE ALTERNATIVES SUGGESTED BY THE COMMISSION

The Commission for the first time in its brief to this Court urges (at pp. 10, 41–42) that the customers have a remedy in federal court under the Sherman Act for a price squeeze. It may well be that there is jurisdiction under the Sherman Act to remedy a price squeeze, although the Commission's suggestion appears to rest impliedly upon its contention, repeated several times throughout its brief, that the fault

[33] The argument by the Commission (Brief, pp. 27-28) that a state commission *can* eliminate the discrimination, but only by raising the retail rates, is amusing, but hardly reasonable.

lies with a "voluntarily depressed retail rate" (Brief, p. 41, n. 34), whereas customers have never characterized the retail rates of AP&L, concentrating instead upon the price squeeze imposed because of the *increased* wholesale rates.

The difficulty with the Commission's argument is that it ignores the complications involved. For example, even if a utility files a wholesale rate which it has every expectation will be well in excess of anything the FPC will allow, after final decision, this Court's decision in *Montana-Dakota Utilities co. v. Northwestern Public Service Company*, 341 U.S. 246 (1951) appears to give the Commission primary jurisdiction over the determination of the propriety of that rate, at least on cost justification. The *Montana-Dakota* case is one of the bases for the so-called "filed rate doctrine" which has been regularly used to preclude or avoid collateral attack on rates. The Commission may be disclaiming such primary jurisdiction (p. 41, n. 34) but the customers have every expectation that this doctrine would be raised by AP&L, if customers sought relief before a federal court in Arkansas. Moreover, if the State Commission has adjudged the retail rates just and reasonable, and that decision is acquiesced in by the company, while it files a very high wholesale rate, the federal court would be required to give damages measured by the difference between the two rate schedules, thus indirectly requiring the company to lower its wholesale rates.

It certainly is arguable that the state and federal courts retain basic jurisdiction to restrain, by injunction or mandamus, a public utility from filing excessive wholesale rates, under the authorities set forth, *supra*, in Secton II. It may be, as well, that relief directed against the utility could be obtained, requiring the utility to modify its filing before the federal or state commissions *Cf. Pan American Petroleum Corp. v. Superior Ct.*, 366 U.S. 656 (1961). With all respect, however, it seems clear that resort to these remedies should, as a matter of comity and accommodation between the various branches of government and between state and federal authority, be a last resort rather than a remedy to be repaired to whenever a



filing instituting a "price squeeze" is made.[34] It would appear that the FPC, perhaps without realizing it, proposes a remedy that would insert the courts, not only into the existing lacunae, but also into a Laocoon.

## CONCLUSION

We have shown that there is no merit to the elaborate legalisms which the Commission has constructed to avoid facing the issue of discrimination here.[35] As this Court and other courts have stated in analogous cases:

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the . . . Act so singlemindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an Administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

*Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47, (1941); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 34 (CADC 1950). It is time, and indeed long past time, for the Commission to recognize its responsibility to protect the customers of wholesale power for resale against the sort of price squeeze which has now become very common. It is these customers which the Commission was established to protect, and its abdication

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[34] We note, *inter alia*, that if a contention is made that a discrimination is "cost justified", the court might find itself embroiled in exactly the sort of lengthy, and difficult, determination of costs made by the FPC and by state regulatory agencies.

[35] In any event overrefined readings of Sections 205 and 206 by the Commission could not apply to Sections 20 and 19 which are plainly applicable to *all* rates.

in this area seriously endangers the pluralistic nature of the electric industry in this country.

For these reasons, and those stated above, the decision below should be affirmed.

Respectfully submitted,

Robert C. McDiarmid
Sandra J. Strebel

February 17, 1976



## STATUTORY APPENDIX

FEDERAL POWER ACT, 16 USC 791 a *et seq.* Section 19, 16 USC 812:

**§812. Public-service licensee; regulations by State or by commission as to service, rates, charges, etc.**

As a condition of the license, every licensee under this chapter which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee under this chapter or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter. (June 10, 1920, ch. 285 § 19, 41 Stat. 1073.)

**Section 20, 16 USC 813:**

**§813. Power entering into interstate commerce; regulation of rates, charges, and so forth.**

When said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefore as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce approved February 4, 1887, as amended, and the parties



subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 807 of this title for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this chapter. (June 10, 1920, ch. 285, § 20, 41 Stat. 1073.)

**Section 201, 16 U.S.C. 824:**

SUBCHAPTER II.—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

**§824. Declaration of policy; application of subchapter; definitions**

(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy

which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this subchapter and sub-chapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter.

(f) No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. (June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847.)

**Section 205, 16 U.S.C. 824d:**

**§824d. Rates and charges; schedules; suspension of new rates.**

(a) All rates and charges made, demanded, or received



by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (June 10, 1920, ch. 285, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851.)



**Section 206, 16 USC 824e:**

**§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission.**

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. (June 10, 1920, ch. 285, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852.)

**Section 209, 16 USC 824h:**

**§824h. Joint boards; composition; references to boards by Commission; cooperation with State Commissions**

(a) The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be

conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 10, 1920, c. 285, § 209, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 853.)